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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 11TH JANUARY 2007 / 21ST PAUSHA 1928

CRL.A.No. 1270 of 2003(A)

SC.151/1998 of I ADDL. SESSIONS COURT, TRIVANDRUM
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APPELLANT: ACCUSED

JOSEPH MICHEAL RAJAMANI FERNANDO,
S/O. REMISIAN FERNANDO,
CONVICT NO.5608,
CENTRAL PRISION, THIRUVANANTHAPURAM-695 012.

BY ADV. ADV.LIJU V STEPHEN(STATE BRIEF)

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY A
PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.C.M. NAZAR

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON ON 11/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

Crl.A.No.1270 OF 2003

Dated this the 11th day of January, 2007.

J U D G M E N T

Appellant is the 1st accused in S.C.No.151/1998 on the file of the 1st Additional Sessions Court, Trivandrum. The prosecution allegations against the appellant are as follows:

In furtherance of a criminal conspiracy hatched between A1 and A3 in Sree Lanka, A1 came to India from Sree Lanka on 20.3.1998 with the intention to illegally export narcotic drugs from India to Sree Lanka. A1 checked into room No.308 of Om Tourist Home at Thampanoor, Thiruvananthapuram on 20.3.1998 itself. Thereafter A1 informed his house about his stay at the said tourist home. After making enquiries about the stay of A1, A3 came to Thiruvananthapuram and met A1 on 22.3.1998 in his room. A3 was then having in his possession a bag containing narcotic drug which has to be sent to Sree Lanka, and packing materials like cellotapes, black leather sheets and also an electronic weighing machine. A1 had purchased a soldering iron for packing the narcotic drug as per the directions of A3. In room No.308 of Om Tourist

Home, A3 weighed the narcotic drug he had brought with the help of electronic weighing machine in the presence of A1 and together they concealed the narcotic drug in a black coloured bag, with the help of polythene, cellotapes and resin. Thereafter A3 left after informing A1 that he would send somebody to take the same to Sree Lanka and that A1 should contact his residence on 23.3.1998. Accordingly, A1 rung up his residence in the night of 23.3.1998 from where he was informed by his family members that a friend of A3 has passed on a message that a lady would be come to Thiruvananthapuram by Air Lanka Flight on 23.3.1998. The colour of the dress the lady would wear and her features were also informed. Accordingly, A1 went to the Thiruvananthapuram Air Port and the lady who is A2 herein and took her to Hotel Thamburu in room No.405. The said room was taken in the name of A1. The sole intention of A1 was to illegally export the narcotic drug kept concealed inside the black coloured bag through A2. A2 had come down to Thiruvananthapuram from Sree Lanka as instructed by one Antony Joseph who is her brother who had promised her that A1 would help her financially if she could carry some trade

goods on behalf of A1 from Thiruvananthapuram to Sree Lanka. While A2 was staying in the said Hotel, A1 informed her that on 27.3.1998 she will have to proceed to Sree lanka with a bag which would contain some trade items and that the said bag should be handed over to a person who approach her at Colombo Air Port.

2. On the above allegations, a charge was framed against the appellant and the 2nd accused under Sections 21, 23, 29 and Section 135 of the Customs Act, 1962. As the 3rd accused was reported absconding, the appellant and the 2nd accused faced trial. To prove the case against the appellant and the 2nd accused, the prosecution examined Pws 1 to 8 and relied on Exts.P1 to P21. MOs 1 to 5 were also produced. On the closing of the prosecution evidence, the appellant and the other accused were questioned under Section 313 of the Code of Criminal Procedure. The appellant denied the allegation levelled against him and had stated that on 26.3.1998, the 3rd accused came to his room and told him that he had a bag with him as more than the excess quantity permissible to carry in the plain and he had asked that

whether the appellant could carry the bag in the plain. The appellant further had stated that he had stated to the 3rd accused that he was having enough luggage with him. The 3rd accused asked him whether he could take the bag up to the Airport and to handover the same to another. Further the appellant had stated that the 3rd accused came to his room on 27.3.1998 in the early morning and entrusted a bag to him and said that the bag would be collected at the Airport by one Balamurukan. The appellant agreed to carry the bag up to the Airport and when the appellant and A2 were waiting at the Airport for the said Balamurugan, Customs Officers came there and asked about the bag and the contents therein. He said that his bag contained only cloths and the 3rd accused had given a bag to him to handover to Balamurugan. Then the Customs Officers asked him whether they could check the said bag and the appellant agreed for that. However, the Customs Officers questioned him about the bag entrusted by the 3rd accused. When the Customs Officers insisted for checking of the bag entrusted by the 3rd accused, the appellant said that, that shall be done only on coming Balamurugan or the 3rd accused. But the Customs Officers

threatened him and had taken the bag and thereafter the Customs Officers had got his signature and he and the 2nd accused were produced before the court and they were sent to jail. However, on relying on the evidence adduced by the prosecution, the trial court found that the 2nd accused is not guilty of any of the offences charged. But the trial court found the appellant guilty under Sections 21 and 30 of the NDPS Act, 1985, and he was convicted thereunder and sentenced to undergo R.I for ten years and a fine of Rs. One lakh with default sentence of fine a further period of R.I for one more year and he was further sentenced to undergo R.I for five years and a fine of Rs.50,000/= with default sentence of R.I for a period of six months under Section 30 of the NDPS Act. However, the trial court directed that the substantive sentences shall run concurrently. The benefit of Section 428 was also allowed to the appellant. The above conviction and sentences are challenged in the appeal.

3. Since the appeal is filed through the jail authorities and the appellant is not having a counsel of his own choice, a State brief member has been appointed to argue the case for

the appellant. This Court heard the counsel appearing for the appellant as well as the learned Public Prosecutor. The counsel appearing for the appellant raised three contentions before this Court. Firstly, the learned counsel submitted that the trial court went wrong in placing reliance on the evidence adduced by the prosecution to find the appellant guilty under Sections 21 and 30 and as there was no independent and reliable evidence to prove the case against the appellant. Secondly, the learned counsel submitted that the trial court committed serious error in finding the appellant guilty of the offences only on the basis of Ext.P21 confession statement as the confession statement has not been recorded as per the provisions of the Criminal Procedure Code and the provisions of the NDPS Act. Thirdly, the learned counsel submitted that the sentence awarded against the appellant is excessive.

4. The prosecution examined Pws 1 to 4 to show that on 27.3.1998 the appellant and the 2nd accused were found at the Trivandrum International Airport with MOs 1 to 5 and thereafter the appellant and the 2nd accused were questioned by PW1. Body of the appellant and the 2nd accused had been

searched in the presence of a Gazetted Officer as contemplated under Section 50 of the NDPS Act. Further the prosecution had proved that the appellant had given Ext.P21 statement under Section 67 of the N.D.P.S. Act to PW1 which was recored by PW1 as the officer authorised under Section 42 of the NDPS Act. Further the prosecution had tried to establish that the appellant and the 3rd accused entered into a conspiracy at Sree Lanka and in consequence of that conspiracy, the appellant and the 3rd accused came to India and thereafter the appellant and the 3rd accused had obtained MO1 bag and filled up the same with the contraband article namely Morphine weighing about 1218.75 grams of heroin. PW1 was the Air Customs Intelligence Superintendent during the relevant time. He had given evidence before the court that on 27.3.1998 while he was waiting at the International Airport, Trivandrum, the appellant and the 2nd accused came to the Airport at about 9 a.m and he got the information that the appellant and the 2nd accused were having narcotic drugs with them. After recording the information in DRI form No.1 and entrusted the same to the Assistant Commissioner of Customs, who was the immediate Superior Official.

Ext.P1 is the copy of the same information. According to this witness, A1 and A2 came to the Trivandrum Airport at about 10.30 a.m and they came to the X-ray counter of International Airport and brought their luggages for the X-ray test. PW1 along with PW2 and other two witnesses went near the appellant and the 2nd accused and identified himself as the Air Customs Intelligence Superintendent and asked about the Passport and other travel documents of A1 and A2. It was understood that the appellant came to India on 20.3.1998 and the 2nd accused came to India on 24.3.1998. Both the appellant and the 2nd accused were having their air tickets to Sree Lanka on 27.3.1998. Approaching the appellant and A2, PW1 asked them whether their bags contained any contraband article. They have answered that nothing with them. However, PW1 asked the appellant and the 2nd accused that he wants to make a search of the body of the appellant and the 2nd accused. Further he asked that whether they want the presence of any Gazetted Officer or Magistrate as required under Section 50 of the NDPS Act. To this question both the appellant and the 2nd accused said that they want the presence of two witnesses. Pws 2 and 3 were also present

at the time when the appellant and the 2nd accused were questioned and prepared Ext.P2 seizure mahazar. On preparing Ext.P2 mahazar, MOs 1 to 5 were recovered from the appellant and the 2nd accused. Subsequently, the appellant had given Ext.P5 (Ext.P21) under Section 67 of the NDPS Act and thereafter at about 11.30 the appellant and the 2nd accused were arrested. This witness has further stated that he continued further investigation of the case and sent Ext.P11 report to PW4, the Additional Commissioner of Customs at Trivandrum Airport. This witness has stated that further investigation of the case has been conducted by PW 5. This witness has further stated that PW7 recorded Ext.P5 statement in Tamil and translated the same into English as Ext.P21. PW8, the Additional Superintendent of Customs, Trivandrum, had stated that he continued the investigation and questioned other witnesses in the case. He completed the investigation and complaint was filed before the court. PW2 is the witness, who accompanied PW1, while the appellant and the 2nd accused were questioned and at the time of preparation of Ext.P2 mahazar by PW1. He had stated that he attested Ext.P2. PW3, the other witness who had

proved that he was also present on 27.3.1998 when PW1 questioned the appellant and the 2nd accused. This witness has further stated that he was also present when PW1 prepared Ext.P2 seizure mahazar. PW4, who was the Additional Commissioner of Customs during the relevant time, had given evidence before the court that PW1 was his subordinate and on 21.3.1998 he had received a report - Ext.P12 from PW1. PW5 was working as the Superintendent of Central Excise, Trivandrum and he had stated that he searched the Om Tourist Home at Trivandrum and prepared Ext.P19 mahazar. PW6 was examined to prove that he had sent the samples for chemical analysis and had obtained Ext.P20 chemical report from C.R.C.L, New Delhi and according to him, Ext.P20 reveals that the sample is Acetyl Morphine of 48.5%. According to this witness, he had received the sample from PW1 and sent the sample for testing and got the result. PW8 was working as the Additional Commissioner of Customs, Trivandrum. He had also given evidence before the court that as per the information and the report furnished by PW1 it is revealed that on 27.3.1998 PW1 had detected the offence against the appellant and the 2nd

accused. He had further stated that PW7 had filed a report with regard to the action he had taken at the Airport while the appellant and the 2nd accused were questioned. This witness has further stated that he had continued the investigation of the case and filed final charge against the appellant and the 2nd accused. Relying on the above evidence, the trial court found the prosecution had succeeded in proving the case against the appellant that he had in possession of 1218.75 grams of Morphine (heroin) out of which PW1 had taken sample and got analysed and as per Ext.P20 report it was established that the sample is Acetyl Morphine of 48.5 %. From the evidence adduced by the prosecution, it was proved that the appellant had made certain preparations to export Morphine substances from India to Sree Lanka and had brought the same to the Airport. But due to the interference of PW1 and the Customs Officers, that was not exported to Sree Lanka. Hence, the appellant had also committed an offence punishable under Section 30 of the NDPS Act. On the above finding, the trial court correctly came to the conclusion that the prosecution had succeeded in proving that the appellant had committed the offences

punishable under Sections 21 and 30 of the NDPS Act.

5. In the light of the contentions raised by the learned counsel, this Court considered the evidence of the prosecution witnesses once again. On an over all appreciation of the entire evidence adduced by the prosecution, it could be seen that the trial court is fully justified in holding that the appellant was found in possession of MO1 black bag which contained 1218.75 grams of Morphine. Hence, this Court is of the view that appreciation of the evidence and the findings entered by the trial court are fully justified. The second contention is that no evidence was adduced by the prosecution other than Ext.P5 (Ext.P21 statement which has been recorded under Section 67 of the NDPS Act) to find the appellant guilty of the offence. The learned counsel appearing for the appellant contends that a reading of Ext.P21 would not show that the above statement was recorded in accordance with Section 28 of the Evidence Act. The learned counsel is of the view that Ext.P21 can be considered as a confession statement given by the appellant while he was in the custody of PW1 and other Customs

Officials. Hence, it is the duty of the prosecution to prove that the statement has been recorded by PW1 after clearing of any inducement or threat as per Section 28 of the Evidence Act. In this context, the learned counsel submits that the prosecution has actually failed to prove that the appellant was having in possession of MO1 bag with the knowledge that the bag handed over by A3 contained contraband article alleged to have been seized by PW1. To substantiate this contention, the learned counsel relied on a judgment of the Apex Court reported in **Narcotics Control Bureau, Jodhpur v. Murlidhar Soni** (2004(5) SCC 151). In the above judgment, the Apex Court had held that the prosecution to show that the accused is in conscious possession of the contraband. The Apex Court had considered the factual situation in that case where the father of the accused came with a bundle of cloths and the accused took his father on a motor bike without knowing that the cloth bundle contained the contraband article and prosecution had not placed any material to show that the accused was in conscious possession of the contraband and hence, the Apex Court held the above view. In this context, the case set up by the prosecution that the

appellant was found in possession of the contraband article is on the basis of Ext.P5 statement given under Section 67 of the NDPS Act. The contention of the learned counsel that since Ext.P21 is a confession statement, it is the duty of the prosecution to prove that the statement was recorded in accordance with the provisions of Section 164 of the Cr.P.C and Section 28 of the Evidence Act. For such a contention, the statement recorded by PW1 under Section 67 of the NDPS Act shall be considered as a confession statement recorded under Section 24 of the Evidence Act and Section 164 of Cr.P.C. The contention of the learned counsel is that Ext.P5 (Ext.P21) statement was given by the appellant when he was under the custody of PW1 and other Customs Officials. Hence, it has to be considered as a confession statement given by an accused as contemplated under Section 24 of the Evidence Act while he is in custody. In this context, the specific case of the prosecution is that after questioning the appellant and the 2nd accused, PW1 had recorded Ext.P5 statement of the appellant at about 9.15 on 27.3.1998 whereas Ext.P8 arrest memo would show that the appellant and the 2nd accused were arrested only after 11.30. Hence,

this Court is not inclined to accept that Ext.P21 be termed or to be considered as a confession statement given by an accused while he was under custody or after arrest. In the above circumstances, the confession statement made by an accused and the statement recorded by an Officer authorised under Section 67 of the NDPS Act is different and distinct from a statement recorded under Section 24 of the Evidence Act and under Section 164 of the Cr.P.C. That apart, the legislative intention of the Parliament while enacting Sections 53 and 67 of NDPS Act is very clear that the statement to be recorded by an officer empowered under Section 42 of the NDPS Act may include a confession statement by an accused but it cannot be taken as a portion of the confession statement. In this context, the judgment of the Apex Court reported in **Nathu v. State of Uttar Pradesh** (AIR 1956 SC 56) is relevant in which the Apex Court had considered Section 28 of the Evidence Act and held that the question of confession statement voluntarily given or on threat or any promise or any inducement unless and until it is proved that Ext.P21 is a confession statement recorded by an investigating officer and the question of

clearing of any threat or an inducement or promise does not arise as this Court had already found that the statement recored under Section 67 of the NDPS Act by PW1 cannot be termed as a confession. Hence the contention of the learned counsel on Ext.P21 cannot be acted on without clearing any threat or promise alleged to have been given by PW1 and other customs officials. From the above discussion, this Court is of the view that the contention of the learned counsel on this aspect is not tenable. Hence, the trial court found the appellant guilty of the offence and imposed punishments.

Considering the nature and gravity of the offence committed by the appellant, this Court is not inclined to interfere with the sentences awarded against the appellant. Accordingly, the appeal fails and it is dismissed.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.1270 OF 2003

JUDGMENT

11th January, 2007.